



# Common EU Minimum Standards for Enhancing Mutual Admissibility of Evidence Gathered in Criminal Matters

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**Abstract** The EU, while developing instruments for evidence-gathering in criminal matters, is not making much of an effort to enhance its admissibility. This may lead to situations where, given the differences between legal systems across the EU, evidence collected in one member state will not be admissible in other member states. Due to the fact that the Lisbon Treaty opened the possibility of adopting minimum rules concerning, among other things, the mutual admissibility of evidence, this paper is dedicated to verifying whether it is feasible to achieve various common EU minimum standards for evidence-gathering.

**Keywords** Common EU minimum standards · Mutual admissibility of evidence · Mutual trust · Telephone tapping · House search · EU cross-border gathering of evidence in criminal matters

## Introduction

The aspiration<sup>1</sup> to achieve mutual admissibility of evidence in the EU was initiated in the 1999 Tampere conclusions.<sup>2</sup> Despite the fact that this concept has already been addressed both by

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<sup>1</sup>The paper encompasses the essentials of doctoral research carried out as part of a co-tutelle agreement between Adam Mickiewicz University and Ghent University. The entire body of research is published as a book entitled *Mutual admissibility of evidence in criminal matters in the EU. A study of telephone tapping and house search*, Maklu 2016.

<sup>2</sup>(...) *Evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there*, Tampere European Council 15 and 16 October 1999 Presidency Conclusions, p. 36.

The work described has not yet been published and is not under consideration for publication anywhere else. Its publication has been approved at the institutes where the work was carried out.

The paper encompasses the essentials of doctoral research published as a book and therefore contains fragments taken from this book.

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EU institutions and academic scholars, the EU still lacks rules which directly address the issue of admissibility of evidence gathered or transferred in the EU cross-border context (Council and Commission 2005; European Commission 2009; European Council 2005; European Commission 2009; European Commission 2010; Gane and Mackarel 1996; Jahae et al. 2000; Hetzer 2004; Gless 2005; Asp et al. 2006; Gless 2006; Spencer 2007; Kuczyńska 2008; Lach 2008; Lach 2009; Allegrezza 2010; De Bondt and Vermeulen 2011a; Spencer 2010; De Bondt and Vermeulen 2010a, b; De Bondt and Vermeulen 2011b; Heard and Mansell 2011; Vermeulen et al. 2010; Vermeulen 2011; Klimek 2012; Kuczyńska 2012; Claverie-Rousset 2013; Ruggeri 2014; Ryan 2014; Armada 2015; Daniele 2015; Nita-Światłowska 2015; Depauw 2016). Recent steps, such as the freezing order (hereafter: FD FO 2003), the European evidence warrant (hereafter: FD EEW 2008) or the European investigation order (hereafter: EIO Directive 2014), are aimed at facilitating evidence-gathering throughout the EU and do not make much effort to enhance its admissibility.

The lack of common rules on admissibility leaves the decision of whether or not to recognise a piece of evidence gathered or transferred in the EU cross-border context to the domestic law of the member states concerned, which may significantly differ from one system to another (Daniele 2015; Gless 2013). This may lead to situations where, given the differences between national procedures, evidence gathered in one member state will not be *per se* admissible in another member state because the way the information was obtained does not fit the latter's procedural requirements (Vermeulen 2011). Therefore, due to the fact that certain formalities are usually crucial when determining the admissibility of evidence obtained abroad, a solution is sought. Originally, member states relied on the rule of *locus regit actum*<sup>3</sup> (hereafter: LRA), which provides that the location where the investigative measure takes place is a decisive element in determining the applicable law. However, as a result of differences between national procedures in evidence-gathering, the *locus regit actum* principle had no potential to accommodate admissibility concerns across the EU. Therefore, LRA was replaced by the *forum regit actum* principle (hereafter: FRA). According to this principle, member states receiving a mutual legal assistance request must, in principle, comply with the formalities and procedures expressly indicated by the requesting member state, unless they lead to incompatibilities with the fundamental principles of the law of the executing member state. The FRA principle has governed EU cooperation since the entry into force of the 2000 EU MLA Convention,<sup>4</sup> and has been subsequently incorporated from mutual legal assistance to mutual recognition instruments,<sup>5</sup> and the EU cross-border system of gathering of evidence still relies on its provisions. However, the simple copying and pasting of the FRA principle from MLA to MR instruments raises doubts about its compliance with the philosophy of mutual recognition, due to the fact that mutual recognition in principle requires that the issuing state accept the way the request is executed on the other member state. Therefore, the possibility of requesting formalities within the framework of mutual recognition is controversial (De Bondt, Vermeulen 2011). Moreover, FRA does not commit a member state to accepting the admissibility of evidence gathered accordingly, and it has very limited effect on the level of admissibility due to the fact that it applies only in a one-on-one relationship, lacking transparent rules in terms of the lawfulness of the way the evidence

<sup>3</sup> Art. 3 ECMA 1959.

<sup>4</sup> Art. 4.1 EU MLA Convention 2000.

<sup>5</sup> Art. 5.1. FD FO 2003; art. 12 FD EEW 2008; art. 9.2 EIO Directive 2014.

was gathered. Finally, the principle of FRA may apply only in the case of gathered evidence, meaning that already existing evidence obtained in a mere national context cannot fall within its scope (Vermeulen 2011). All the mentioned weaknesses give rise to the question of whether there are other means to facilitate mutual admissibility of evidence in criminal matters in the EU?

An alternative to the *forum regit actum* principle is offered by the TFEU, which opens the possibility of adopting minimum rules concerning, among other things, the mutual admissibility of evidence.<sup>6</sup> Adoption of these rules would mean that, in the context of EU cooperation, evidence would have to be gathered according to commonly agreed minimum standards, complemented by *per se* admissibility of evidence gathered accordingly (Vermeulen 2011). Moreover, minimum standards have the potential to accommodate the above listed weaknesses of FRA. Firstly, the gathering of evidence under commonly agreed minimum standards would be complemented by *per se* admissibility, which resolves the problem of the uncertainty of FRA. Secondly, due to the fact that the common standards would be applicable within the entirety of the EU, the evidence gathered accordingly would enjoy *per se* admissibility status in all member states, not only in one-to-one relations, as in the case of FRA. Thirdly, minimum standards would consist of transparent rules regarding the way the evidence is gathered, preventing dilemmas as to the lawfulness of the evidence-taking and eliminating evidentiary-laundering. Finally, if applicable also in a merely domestic situation, minimum standards could also resolve the issue of evidence gathered in a domestic context and transferred upon cross-border cooperation (Vermeulen 2011). It is noteworthy that the concept of common minimum standards for evidence-gathering has already been discussed both by EU institutions and in the academic literature (Commission of the European Communities 2005; Council and Commission 2005; European Commission 2009; European Commission 2010; Spencer 2007; Allegrezza 2010; Vernimmen-Van Tiggelen and Surano 2008; Spencer 2010; Vermeulen 2011; De Bondt and Vermeulen 2011a, b; Depauw 2016). Moreover, many member states are in favour of this concept.<sup>7</sup>

Undoubtedly, achieving these standards will be challenging. First of all, it would require a balancing of the search for common standards to overcome national diversities, on the one hand, and accepting the fact of international diversity on the other. Secondly, the question arises whether all investigative measures require the diversity of domestic regimes to be overcome, or whether the EU could resign from ruling all of them out and accepting national diversities with regard to certain measures. This question follows from the fact that some incompatibilities between member states are of minor value and, consequently, may not require unification at the EU level. Moreover, it is an open question whether it is necessary to adopt specific standards accommodated to the different types of evidence, or whether a 'one-size fits all' approach could be an option here. More fundamentally, the question arises: is it feasible to arrive at common EU minimum standards to enhance *per se* admissibility of evidence and, if so, to what extent?

<sup>6</sup> Art. 82. 2 TFEU: *To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States (...).*

<sup>7</sup> In this context, see the study on EU cross border gathering and use of evidence carried out at Ghent University: Vermeulen et al. 2010, and the summary of the replies to the green paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility < [http://ec.europa.eu/justice/news/consulting\\_public/0004/summary\\_of\\_replies\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0004/summary_of_replies_en.pdf)>.

## Study on Common EU Minimum Standards for Enhancing *per se* Admissibility of Evidence Gathered from Telephone Tapping and House Search

In 2015–2016, a study on common EU minimum standards for enhancing mutual admissibility of evidence was conducted at Ghent University and Adam Mickiewicz University. Through a double case study of telephone tapping and house search, the study examined whether it is feasible to come to various types of common EU minimum standards in view of enhancing *per se* admissibility of evidence gathered from both measures, and whether compliance with these minimum standards would finally shape the so far non-existent concept of free movement and mutual recognition of evidence in criminal matters in the EU. The choice of telephone tapping and house search was dictated by two factors. First, both measures are of a highly intrusive character which means they deserve special focus, including at the EU level, in order to minimize the risk of abuses following from cross-border cooperation. Second, the potentially harmful nature of both measures allows one to ask comparable research questions, to carry out a joint investigation according to the same research method and, therefore, to have the possibility of obtaining identical conclusions. The research combined three methodological techniques: a comparative study, an investigation of Council of Europe and EU legislation and policy documents, and an analysis of the jurisprudence of the ECHR. The comparative study consisted of an analysis of domestic norms concerning telephone tapping and house search in six selected member states: England and Wales, France, Ireland, the Netherlands, Poland and Spain. The member states were selected in order to cover a variety of legal systems and different approaches to evidentiary issues, so as to illustrate the potential problems that may occur in the field of mutual admissibility of evidence. The second methodological technique comprised an analysis of legislation and policy documents regarding cross-border cooperation in criminal matters, developed both within the EU and with the Council of Europe's cooperation. The outcomes of this analysis helped in understanding the extent to which member states are willing to establish rules for the purposes of EU cross-border cooperation. Finally, the research also investigated the relevant case-law of the ECtHR, in order to ensure compliance with the common fundamental rights and norms developed by the Court. This combination of methodological techniques proved useful in reporting the current state of play and assessing how far we can move towards deriving common EU minimum standards for enhancing mutual admissibility of evidence. The main results of the research are outlined below.

### Defining Mutual Distrust

If *per se* admissibility of evidence gathered from telephone tapping and house search is at the objective, it is necessary to enhance mutual trust by introducing common minimum standards for the sharpest points of contrast between domestic provisions with regard to certain measures. Therefore, the first step when investigating the concept of common EU minimum standards to enhance *per se* admissibility of evidence consisted of reporting characteristics that may negatively impact upon mutual recognition of evidence gathered from telephone tapping and house search and, therefore, deserve to be mitigated by means of common standards. Due to the fact that both measures seriously affect the right to respect for private life and therefore require certain criteria for issue and execution, it was also necessary to detect and investigate the relevant case-law of the ECtHR in order to provide an adequate level of protection against abuses. After cross-referencing

domestic provisions with the case-law of the ECtHR, the factors that may hinder mutual trust with regard to both measures were reported in the following fields:

- Rules governing telephone tapping and house search, in particular, the scope of both investigative measures *ratione auctoritatis*, *ratione materiae*, *ratione loci*, *ratione temporis* and *ratione personae*; and
- Procedural rights associated with both measures, namely, the right to be notified of them and the right to legal remedies against their exercise.

Therefore, the research investigated how it would be possible to increase mutual trust with regard to these elements by coming to common minimum standards, in view of enhancing *per se* admissibility of evidence gathered therein.

## Minimum Standards with Regard to Rules Governing Telephone Tapping and House Search

### Ratione Auctoritatis

Both telephone tapping and house search may seriously affect the right to respect for private life. Thus, it is necessary to ensure that these measures are taken in accordance with principles of necessity and proportionality, and with adequate protection against abuses of power. One of the guarantees thereof is a designated authority responsible for granting permission for both measures. The lack of common EU standards in this matter may cause obstacles in the field of mutual admissibility of evidence, since different member states empower different authorities to order the measures.<sup>8</sup> Consequently, evidence gathered in a house search where the warrant was issued by a prosecutor may be questioned in member states which require a search warrant to be issued by a judge etc. That obstacle could be overcome by adopting common requirements for the competences of authorities designated to issue the measures, and their capability of ensuring protection against abuses of power. In other words, operating under the same level of protection against arbitrary interferences has the potential to enhance mutual trust and, consequently, mutual admissibility of evidence gathered from both measures. This common level could be achieved by ensuring that both measures are reviewed *a priori* or *a posteriori* by a judicial authority or an authority independent of the issuing body's activity.<sup>9</sup> In this scenario, member states would be safe to assume *per se* that, irrespective of how the foreign issuing authority is named, it ensures commonly agreed, minimum standards

<sup>8</sup> As the overview of domestic legislation has shown, the majority of the member states covered by the research entrust authorities of judicial nature, namely judges, courts or investigative judges, with granting authority. However, the term 'judicial authority' has an ambiguous meaning in the context of EU cooperation in criminal matters, see art. 1.1 ECMA 1959; art. 24 ECMA 1959; art. 17 EU MLA 2000 and its Explanatory Report 2000 on art. 17; art. 2a FD FO 2003; art. 2c FD EEW 2008p; art. 6.1 FD EAW 2002; art. 2c EIO Directive 2014 and EIO Explanatory Memorandum 2010, p. 4. In this respect see also: Vermeulen et al. 2012a, p. 65 *et seq*; Weyembergh 2013; Armada 2015.

<sup>9</sup> This conclusion corresponds with the case-law of the ECtHR: *Malone v. The United Kingdom* §§ 70; *Bykov v. Russia* §§ 78; *Klass and Others v. Germany* §§ 56; *Dumitru Popescu v. Romania* §§ 70–73; *Zakharov v. Russia* §§ 258; *Iordachi and Others v. Moldova* §§ 40 and §§ 51; *Misan v. Russia* §§ 57; *Smirnov v. Russia* §§ 45; *Harju v. Finland* §§ 44–45; *Camenzind v. Switzerland* §§ 46–47.

against the risk of abuses of power. This could help member states to accept evidence gathered by diverse authorities.

### Ratione Materiae

Thus far, there is no such thing as common grounds for evidence-taking in the EU and each member state itself sets the grounds for ordering investigative measures in accordance with its domestic law.<sup>10</sup> This results in a variety of provisions which, consequently, may hamper smooth evidence-gathering at the EU level.<sup>11</sup> Dilemmas arise, especially when the requested measure would not be available in a similar domestic case in the executing state, due to the fact that, for example, the use of the investigative measure is restricted to certain preconditions and the foreign order does not meet these national requirements. The research has revealed that *ratione materiae* issues could be tackled by applying the concept of ‘alternative use of the 32 MR offences list’,<sup>12</sup> originally developed under the framework decision on the European evidence warrant,<sup>13</sup> which would ensure the availability of both measures if the offence being investigated is related to any offence included in the ‘MR offences list’. This would ensure that no differences exist among member states as to the allowance for the measures. Operating under an exhaustive list of offences would free member states from context-sensitive double availability of the measures and contribute to the smooth gathering and use of evidence. For other offences, which are not included in the ‘MR offences list’, the general provisions would still apply. In other words, in cases not concerning the MR offences, the member states might still subject the execution to the domestic admissibility requirement.

### Ratione Loci

Inconsistencies of *locus* may arise when execution of an investigative measure indicated by another member state surpasses the *ratione loci* scope of the executing state because the locations or places where the measure can be taken or ordered are more limited in the domestic

<sup>10</sup> The comparative study has shown striking differences between the investigated jurisdictions in their approaches to the preconditions required for issuing both measures. The most common grounds apparent among these six jurisdictions are as follows: an exhaustive list of offences, a minimum imprisonment threshold, general grounds or reference to the objective of the interference.

<sup>11</sup> The instruments governing cross-border cooperation in criminal matters in the EU provide different approaches to tackling the availability of investigative measures in the cross-border context. Extradition-related instruments rely on the concept of extraditable offences, which links the allowance for the measure with imprisonment thresholds in both the requesting and requested state (see: art. 2.1 CoE Extradition 1957; art. 2.1 Benelux Extradition Treaty 1962; art. 2.1 EU Extradition 1996; art. 8 Second Protocol (2001)). In this respect see also: Vermeulen and Vander Beken 1996; Vermeulen 2006; Górski 2010; Vermeulen et al. 2012a; De Bondt 2012; Jasiński 2015). Other MLA instruments refer to *ordre public*, however, with regard to some measures, such as monitoring of bank information, home searches or interception of telecommunications, the execution may be dependent on double criminality or compliance with domestic provisions regarding the availability of the measure in the requested state in a similar domestic case (see: arts. 8, 9.2, 17 and 18 Second Protocol 2001; arts. 10.2, 12 and 18.5b EU MLA Convention 2000; art. 5a-b ECMA 1959; art. 1.3 Protocol 2001).

<sup>12</sup> ‘MR offences’ are the offences listed in art. 2.2 FD EAW 2002. It should be highlighted that the MR offences vary slightly across MR instruments.

<sup>13</sup> The instrument, regardless of the availability of measures for domestic cases, requires the search and seizure to be available for the purpose of executing an EEW which relates to the offences included in the MR offences, art. 11.3 FD EEW 2008. In this respect see also: Vermeulen and De Bondt 2009; Vermeulen et al. 2010.



context (Vermeulen et al. 2010).<sup>14</sup> Consequently, for telephone tapping, it may be the case when the location of the telephone is a determining factor, e.g. home, office or publicly available telephones.<sup>15</sup> In all these cases the key factor is the location of the telephone, and member states may have different measures regarding the availability of this measure to investigative agencies. Therefore, with the aim of overcoming diversity as to the legitimacy of the measure, it is recommended that member states clearly permit telephone tapping targeted by location, if it is necessary for the purposes of EU cross-border cooperation.<sup>16</sup> That would do away with discussions as to the legitimacy of the measure and the admissibility of any evidence gathered therein. Taking into account the wide range of persons whose conversations may be intercepted within the tapping of telephones determined by location (e.g. flat-mates, office-mates, random users), mutual trust as to the measure could be additionally enhanced if member states ensured that it is available only in exceptional cases and, obviously, if the requirements for necessity and proportionality are fulfilled, and that the stored data are screened and processed in a way that minimizes the risk of abuses. With regard to house search, it is necessary to consider what constitutes a 'house' in the context of EU cross-border evidence-gathering. After cross-referencing domestic approaches<sup>17</sup> with the EU norms<sup>18</sup> and the case-law of the ECtHR,<sup>19</sup> it transpires that the common understanding of 'house' in this context could be based on a reasonable expectation of privacy and on the inaccessibility of the place to the public. Therefore, 'house' would be a place where one intends to live, but also an office, premises located within public authorities, a vehicle and any other place which is not accessible to the public. Operating under the same understanding of the scope of 'house' could facilitate cross-border searches and contribute to enhancing mutual trust in evidence gathered therein.

## Ratione Tempori

Differences between member states over *ratione temporis* concerns may also hamper mutual admissibility of evidence gathered from telephone tapping and house search in the EU cross-border context. In cases of telephone tapping, it may be problematic if the period of time for which permission is issued surpasses the *ratione temporis* scope of the executing state because

<sup>14</sup> The comparative study has shown that the majority of member states do not explicitly state rules for telephone tapping targeted by location, which leaves open the question of whether the measure is permitted.

<sup>15</sup> The case-law settled by the ECtHR shows that the Court allows for interceptions and surveillance linked with particular locations, see: *Zakharov v. Russia*, §§ 264; *Kennedy v. The United Kingdom*, §§ 160; *Klass and Others v. Germany*, §§ 41; *Malone v. The United Kingdom*, §§ 64; *Halford v. The United Kingdom*, §§ 52; *Amann v. Switzerland*, §§ 43; *A. v. France*, §§ 35–36; *Perry v. The United Kingdom* §§ 37; *Uzun v. Germany* §§ 44.

<sup>16</sup> The wording of the instruments and documents concerning telephone tapping leads to the conclusion that the cross-border interception may also refer to a measure determined by the location of the telephone, see: art. 2a Recommendation 1985; art. 18 EU MLA Convention 2000; art. 1 Council Resolution 1995; art. 30.3c EIO Directive 2014.

<sup>17</sup> The member states included in the research tend not to specify the scope of premises that may be searched in their legislation. As a result, these issues are elaborated on by scholars and jurisprudence.

<sup>18</sup> The majority of instruments governing EU cross-border house search remain silent when it comes to the notion and scope of the word 'house'. Recital (7) FD EEW 2008 makes reference to 'private premises' but without further specification of that term. On the other hand, art. 41.5c SIC 1985 equates private homes with places not accessible to the public.

<sup>19</sup> See, *inter alia*: *Saint Paul Luxembourg S.A. v. Luxembourg*, §§ 37; *Rachwalski and Ferenc v. Poland*, §§ 68; *Funke v. France*, §§ 48 and *Crémieux v. France*, §§ 31; *Chappell v. the United Kingdom*, §§ 51; *Buck v. Germany*, §§ 31–33; *Niemietz v. Germany*, §§ 29–31; *Roemen and Schmit v. Luxembourg*, §§ 64–65; *Peev v. Bulgaria* §§ 39; *Petri Sallinen and Others v. Finland*, *Buck v. Germany*, §§ 31.

the time limits in the executing state are shorter or because the measure is subject to intermediate renewal where it lasts for the duration ordered.<sup>20</sup> With regard to house search, problems may arise from the time of the search, especially searches conducted at night and at ‘unreasonable hours’.<sup>21</sup> It thus appears that, with regard to telephone tapping, mutual trust could be enhanced by member states adopting straightforward rules at domestic level regarding the time limits of the measure, namely, maximum duration and conditions for its renewal. This could allow member states to execute orders with various durations of the measures, even if different from those that would apply in a similar domestic case.<sup>22</sup> In other words, member states could simply acknowledge differences coming from domestic legislation, on condition that they provide clear rules as to the duration of the measure and its renewal. This approach relies on the domestic provisions of the issuing state, and leaves this state with the decision as to the time limit for the telephone tapping warrant to be issued and executed, according to its law. Given the fact that mutual trust would be enhanced by ensuring that member states envisage provisions relating to the maximum duration of the measure and the conditions of its renewal, the executing state could *per se* assume that the measure is to be issued and renewed (if necessary), according to the law that provides the same level of protection. However, what brings the necessary flexibility to this rule for the executing side is the overall maximum duration provided by the domestic law of the executing state, which constitutes the maximum limit to which the executing state may act. In other words, member states would apply foreign requirements regarding the duration of the measure but only to the maximum extent provided by the law of the executing state. With regard to house search, mutual trust could be taken to a higher level by member states ensuring that searches can be conducted at night or at unreasonable hours only in exceptional cases and if necessary due to the particular circumstances of the case.<sup>23</sup> In this scenario, member states would *per se* trust that, irrespective of

<sup>20</sup> All systems investigated in the study adhere to clear provisions regarding the maximum duration of the measure and the conditions of its renewal. However, there are differences in terms of the duration of a single issuance and of the total time limits of the measure, which are apparent across the jurisdictions investigated. At the same time, neither the MLA nor the MR instruments provide straightforward provisions with regard to the maximum duration of the measure. The instruments and policy documents solely address whether there is an indication of the duration of the measure in the request/order and what should happen in cases where the desired duration exceeds the domestic scope *tempori* of the requested state (see art. 2 and 3 Council of Europe; Recommendation No. R (85) 10; art. 18.3 EU MLA Convention 2000; art. 30.3 EIO Directive).

<sup>21</sup> There is no coherence between the investigated legal systems as to the time of searches. Whereas some provide precise time frameworks for the measure, the other states refer to ‘reasonable hours’. None of the investigated laws explicitly prohibit night searches. However, all member states require that night searches shall be conducted solely in exceptional cases. The instruments governing evidence-gathering do not much address the search-time concerns. The only example may be found in the EEW Proposal 2003, which reads that *a search of private premises should not start at night, unless this is exceptionally necessary due to the particular circumstances of the case* (art. 12.2a EEW Proposal 2003).

<sup>22</sup> This approach fully corresponds with the approach of the ECtHR, which is of the opinion that the law should provide for clear limitations on the duration of telephone tapping, as well as a procedure to follow after the expiry of this time and grounds for its renewal. However, the Court accepts long durations and the absence of a maximum limit, as far as it is reasonable in the circumstances of the case and as long as it is accompanied by adequate safeguards, see *inter alia*: *Kruslin v. France*, §§ 35; *Kennedy v. The United Kingdom*, §§ 161; *Iordachi v. Moldova*, §§ 45; *Van Pelt v. the Netherlands*, *Misan v. Russia*, §§ 54; *Rachwalski and Ferenc v. Poland*, §§ 71–73; *Kučera v. Slovakia*, §§ 119 and §§ 122.

<sup>23</sup> The ECtHR also allows night-searches insofar as the measure is necessary and proportional. However, according to the Court, the terms of carrying out the measure during the night should have a clear legal basis in domestic law, and the key feature is always the necessity and proportionality of the search time in a particular case, see *inter alia*: *Misan v. Russia*, §§ 54; *Rachwalski and Ferenc v. Poland*, §§ 71–73; *Kučera v. Slovakia*, §§ 119 and §§ 122.



*ratione temporis* incompatibilities between their respective domestic laws, the measure would be carried out according to commonly agreed minimum standards, and would not carry a risk of abuses of power.

### Ratione Personae

Certain *personae* issues in EU cross-border cooperation may arise when evidentiary measures can only be taken in member states for a limited category of persons and when these categories vary depending on the member state concerned, or when domestic provisions provide special rules relating to the gathering of evidence from specific persons or professions. This may relate, for example, to persons covered by immunities; persons obliged not to disclose information classified as ‘privileged’ or ‘confidential’; or confidentiality related to some professions or functions, such as lawyers, journalists and doctors. Extra dilemmas may arise with regard to the targeting of third persons by the measures, as well as the status of third persons affected by chance, and with regard to the liability of legal persons to be subject to the measure (Vermeulen et al. 2012a, b). Neither the MLA nor the MR instruments have made telephone tapping or searches of premises explicitly dependent on specific *ratione personae* requirements. However, the MLA instruments traditionally make the execution of a letter rogatory dependent on compliance with the domestic *personae* scope and, if the legal system of the executing state grants immunity to the requested person, then the requested state may refuse assistance.<sup>24</sup> In contrast, the MR instruments explicitly refer to immunity or privilege and make it a ground for non-recognition or non-execution, even if there is no common understanding in the EU of what constitutes immunity or privilege.<sup>25</sup> Given the fact that the EIO Directive explicitly refers to legal, journalistic and medical privileges,<sup>26</sup> it is necessary to consider whether arriving at common EU minimum standards is feasible, at least with regard to these privileges, especially in light of the domestic provisions which also give special consideration to the professions concerned.<sup>27</sup> Accordingly, with regard to lawyers, mutual trust between member states could be enhanced by introducing clear rules regarding the inviolability of client-lawyer confidentiality and, consequently, the inadmissibility of evidence gained *via* the tapping of lawyers’ telephones and searches of law firms in pursuit of information which falls within the scope of the right of defence.<sup>28</sup> The mutual admissibility of evidence obtained from journalists and medical specialists could be taken to a higher level if member states were to ensure that the measures are carried out only

<sup>24</sup> Recommendation 1985.

<sup>25</sup> Art. 20 FD EAW 2002; art. 7.1b FD FO 2003; art. 13.1d FD EEW 2008; art. 11.1a EIO Directive 2014.

<sup>26</sup> Recital (20) EIO Directive 2014.

<sup>27</sup> The comparative study has shown that member states provide limitations on the use of the measures, specifying categories of persons who deserve special protection, due to the fact that they are covered by immunities or privileges. These categories of persons vary from one member state to another, however, all those included in this research give lawyers special protection. It is also worth noting that member states are not coherent when it comes to telephone tapping or searching the premises of legal persons. Whereas, in some the legislation contains straightforward provisions relating to this issue, in other member states the legislation remains silent on the matter.

<sup>28</sup> *Michaud v. France* §§ 117–118; *S. v. Switzerland*, §§ 48; *Aalmoes and 112 Others v. the Netherlands (dec.)*; *Case of Iordachi and Others v. Moldova*, §§ 50; *Elci and Others v. Turkey*, §§ 669; *Kopp v. Switzerland*, §§ 72–75; *Sallinen and Others v. Finland*, §§ 89–92; *Niemietz v. Germany*, §§ 35–35; *Roemen and Schmit v. Luxembourg*, §§ 69–72; *Smirnov v. Russia*, §§ 47–48.

when necessary in the circumstances of the case and are proportionate to the aim being pursued and, moreover, that the disclosure of protected sources is limited to an unavoidable minimum.<sup>29</sup> It would be left to the member states how they effectuate these requirements. Mutual trust between member states could also be enhanced with regard to the third parties who may be affected by the measures by providing clear rules as to the gathering, examination, storage and use of the data concerning third parties and ‘necessary participants’.<sup>30</sup> Finally, *per se* admissibility of evidence could also be facilitated if member states uniformly permit the targeting of legal persons with the measures. However, as in the case of third parties, it would be necessary for the measures to be accompanied by clear rules for examining, screening and sorting data gathered by chance.<sup>31</sup> All these dimensions of *ratione personae* minimum standards would enhance mutual trust between member states and ensure, even if national procedures may differ, that member states provide the same level of protection with regard to persons who may be targeted by the measures. Taking evidence from lawyers, doctors, journalists, third parties or legal persons would meet the same conditions and guarantees, irrespective of the member states concerned. As a result, both the issuing and executing states involved in cooperation could *per se* assume that the measure is covered by the same level of protection as in a similar domestic case. This could contribute significantly to enhancing *per se* admissibility of evidence throughout the EU.

### Minimum Standards with Regard to the Procedural Rights Associated with Telephone Tapping and House Search

Undoubtedly, the mutual recognition of evidence gathered through such harmful measures as telephone tapping and house search can only work if member states trust *per se* that evidence obtained abroad has not violated the fundamental rights of the persons concerned. Consequently, it is necessary to ensure that the cross-border context of evidence-gathering neither deprives individuals of their rights nor reduces the accessibility and effectiveness of those rights.

Among the fundamental rights enshrined at the EU level, both telephone tapping and house search strongly affect the right to respect for private life. Therefore, in order to minimize the risk of violations of this right, the use of both measures is strictly limited and may apply only, *inter alia*, if necessary in a democratic society in the interests of national security, for the prevention of disorder or crime, for the protection of the rights and freedoms of others etc. Moreover, both the ECHR and the Charter of Fundamental Rights of the European Union (hereafter: EU Charter) grant to persons whose rights guaranteed therein are violated the right to an effective remedy in order to protect and pursue these rights. In the case of the right to respect for private life, these remedies are aimed at verifying the use of measures which carry a

<sup>29</sup> *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, §§ 100–102; *Sanoma Uitgevers B.V. v. the Netherlands*, §§ 96–99; *Voskuil v. the Netherlands*, §§ 64–65; *Stichting Ostade Blade v. the Netherlands*, §§ 64–68, *Z. v. Finland*, §§ 107 and §§ 103.

<sup>30</sup> *Kennedy v. The United Kingdom*, §§ 160; *Huvig v. France*, §§ 34; *Zakharov v. Russia*, §§ 245; see also: *Greuter v. the Netherlands* (dec); *Kruslin v. France*, §§ 35; *Klass and Others*, §§ 21 and 51; *Weber and Saravia*, §§ 25 and 117; *Kennedy v. The United Kingdom*, §§ 167; *Kennedy v. The United Kingdom*, §§ 162; *Liberty and Others v. The United Kingdom*, §§ 64–65, see also: *Zakharov v. Russia*, §§ 302; *Vasylchuk v. Ukraine*, §§ 79. *Buck v. Germany*, §§ 45–53, see also: *Misan v. Russia*, §§ 56–64.

<sup>31</sup> *Association for European Integration and Human Rights and Ekimdzhiiev v. Bulgaria*, §§ 60, *Société Colas Est and Others v. France*, §§ 42; *Crémieux v. France*, §§ 40–41.

risk of violations of this fundamental right. In this light, it is clear that ensuring that the cross-border context does not deprive the person whose privacy was infringed of the possibility to challenge the measure effectively could significantly contribute to enhancing mutual trust and mutual admissibility of evidence across the EU.<sup>32</sup>

## The Right to Legal Remedies

The overview of the instruments governing evidence-gathering reveals that there is no provision whatsoever expressly regulating the right to legal remedies against evidentiary measures, including telephone tapping and house search. Therefore, the availability and manner of challenging the investigative measures depend on the law of the member states concerned. The EIO Directive 2014 ensures legal remedies equivalent to those available in a similar domestic case,<sup>33</sup> however, this provision becomes superfluous in cases where domestic law does not provide such a remedy or its execution is not feasible in certain stages of the procedure. Another conclusion is that the EU does not as yet provide more extensive protection for legal remedy against telephone tapping or house search other than that provided in the ECHR and the EU Charter. At the same time, the comparative study of domestic regulations has shown variations and differences between systems in their approaches to the legal remedies. Whereas, in some member states the possibility of challenging the measures already arises at pre-trial stage within an interlocutory appeal, other states do not provide a specific legal remedy and rely on the exclusionary rules applicable at trial stage or provide this right beyond the criminal proceedings within a civil or administrative procedure. Another sharp point of difference is the aim pursued by the remedy, which may be the exclusion of evidence, its nullity or compensation for damages. All these diversities may hinder the challenge to procedure in cross-border cases. Therefore, the mutual trust between member states and, consequently, the mutual admissibility of evidence, could be enhanced by ensuring that member states provide effective legal remedies against telephone tapping and house search for the persons whose right to privacy was affected by the measures carried out in a cross-border context. This approach follows from the case-law produced by the ECtHR which is satisfied with various forms of remedies, as long as these remedies afford adequate and effective safeguards against abuse.<sup>34</sup> This effective apparatus would give any person whose right to respect for privacy was infringed a legal remedy to challenge the substantive reasons underlying the decision to obtain evidence, including whether the measures are necessary and proportionate and the manner in which the measure was issued and exercised. Accordingly, depending on the circumstances of the case and person concerned, these remedies may vary significantly between member states and apply either in criminal, civil or administrative proceedings. However, it should be noted that if the legal remedy is granted to the entitled person and it

<sup>32</sup> With regard to fundamental EU rights see also: Brants 2005; Gless 2005; Löff 2006; Vermeulen 2008; Spronken et al. 2009; Vermeulen and van Puyenbroeck 2010; De Bondt and Vermeulen 2010b; Van Puyenbroeck and Vermeulen 2011; Marguery 2013; Meysman 2014.

<sup>33</sup> Art. 14.1 EIO Directive 2014.

<sup>34</sup> *Association for European Integration and Human Rights and Ekinidzhiev v. Bulgaria* §§, 101–102; *Rotaru v. Romania*, §§ 59–59; *Zakharov v. Russia*, §§ 299–300; *Klass and Others v. Germany*, §§ 71; *Webber and Saravia v. Germany*, §§ 135–136; *Harju v. Finland*, §§ 44; *Smirnov v. Russia*, §§ 45, *Association “21 December 1989” and Others v. Romania*, §§ 167.

is effective, the available procedure is of secondary importance. Operating under this standard would significantly enhance mutual trust between member states, even though effective remedies may differ between member states, apply in different proceedings and entail different consequences. What is of utmost importance is that persons who believe their fundamental rights have been infringed are granted an effective measure to enforce these rights, and that the cross-border context of proceedings does not hamper them. The key here is the ‘effectiveness’ of the right to remedy, which can be ensured differently within legal systems across the EU. As a result, mutual trust in a cross-border gathering of evidence would be taken to a higher level and member states could accept evidence *per se*, believing that the gathering of evidence abroad does not violate fundamental rights ensured at the EU level.

### The Right to be Notified of the Measures

The right to notification of the measures plays an important role in enhancing mutual trust between member states, complementing the right to legal remedies by enabling their enforcement. Consequently, to tackle procedural rights in the cross-border gathering of evidence fully and completely, it is also necessary to come to common minimum standards with regard to the right to be notified of telephone tapping and house search.<sup>35</sup> This goal can be achieved by member states ensuring that persons entitled to legal remedies against the measures carried out in a cross-border context are also effectively informed about the fact the measure was carried out and that a legal remedy against its exercise is available. In the case of both measures, it would be up to member states to ensure the effective performance of such notification. In cases concerning telephone tapping, it could be effectuated as a separate decision, or through access to the case files, depending on the legal system and way of conducting proceedings.<sup>36</sup> With regard to house search, the right to be notified of the measure could consist of delivering notification (preferably written) of the search, which explains the reason for the search, the objects, documents or data seized, and the legal remedies available.<sup>37</sup> However, member states could provide other ways of providing the notification, as long as it ensures detailed

<sup>35</sup> Surprisingly, the right to be notified of the measures constitutes a sharp point of difference between member states. At the same time, an overview of the MLA and MR instruments reveals that notification of the measures has not been given a lot of attention at the EU level. Accordingly, the right to be notified of the measures conducted in the cross-border context depends on the domestic provisions of the member states concerned which, as noted above, differ from one member state to another. For example, with regard to telephone tapping, some member states provide individual notification of the measure given to the persons whose telephones have been tapped, others provide no individual notification of the measure, but the parties may be notified by accessing the case files. With regard to house search, whereas some member states provide for the obligatory/alternative presence of the occupier or/and witnesses, others grant notification of the search to the person concerned.

<sup>36</sup> With regard to telephone tapping, the Court is of the opinion that notification of the interception should be provided to the person concerned as soon as it can be made without jeopardising the purpose of the interference. Such notification may also be fulfilled by granting access to documents relating to interceptions. However, under some circumstances, the Court accepts a lack of individual notification which at the same time does not deprive the person concerned of access to the transcripts and legal remedies against the measure, *Association for European Integration and Human Rights and Ekimdzhiiev v. Bulgaria*, §§ 85, *Zakharov v. Russia*, §§ 302.

<sup>37</sup> In the field of house searches, the Court provides minimum standards for safeguards which include, *inter alia*, notification of the person whose premises have been searched and the need for independent third parties to be present at the search, *Alexov v. Bulgaria*, §§ 128; *Camenzind v. Switzerland*, §§ 46; *Aleksanyan v. Russia*, §§ 214; *Iliya Stefanov v. Bulgaria* §§ 43.

information explaining the principles and scope of the search, sufficient for effective questioning of the measure.

## Conclusions

The study on telephone tapping and house search has proved the feasibility of coming to various types of common EU minimum standards. The research has detected the factors that may hamper mutual recognition of evidence gathered from telephone tapping and house search and derived minimum standards with regard to these factors with a view to enhancing mutual trust between member states as to the way of evidence-gathering. Operating under commonly agreed minimum standards would fully correspond with the pure mutual recognition philosophy due to the fact that mutual recognition in principle requires that the issuing state accept the way the request is being executed on the other member state. In other words, gathering of evidence under commonly agreed minimum standards would make it easier for an issuing state to accept the way that the evidence is being gathered in the executing state. Therefore, the idea of common EU minimum standards has the potential to accommodate the problem of mutual admissibility of evidence in criminal matters in the EU.

The study has also revealed that different investigative measures, given their diverse nature and the potential abuses that they may cause, will therefore require different, measure-specific standards. Consequently, more work still has to be done with regard to other investigative measures. However, the research has shown that not all incompatibilities between member states require unification at the EU level, but only the incompatibilities which may have a negative effect on mutual trust. These types of measures should be selected on the basis of their intrusive character, the questionable admissibility of evidence gathered, or expected differences between member states that could potentially obstruct mutual admissibility of evidence.<sup>38</sup> These minimum standards could be subsequently adopted by means of a directive regarding minimum standards for gathering of evidence. That could finally shape the concept of mutual recognition of evidence in criminal matters in the EU.

The outcome of the study gives rise to the question whether there is still any future for the *forum regit actum* principle if minimum standards are adopted? On the one hand, the *forum regit actum* principle is out-dated and does not fit in with the mutual recognition concept, but on the other hand this principle may still have a significant supporting value. However, operating under minimum standards would reduce the role of the *forum regit actum* principle in EU cooperation in criminal matters. Therefore, complying with minimum standards would be sufficient to enhance mutual admissibility of evidence and in this respect the *forum regit actum* principle should no longer have any effect.

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<sup>38</sup> Thus far, progress towards common standards has also been made with regard to forensic evidence, see: Depauw 2016.

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